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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 591

TURLOCK IRRIGATION DISTRICT, CALIFORNIA, AND MODESTO IRRIGATION DISTRICT, CALIFORNIA, *Petitioners*

v.

FEDERAL POWER COMMISSION, *Defendant*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY OF PETITIONERS TO THE BRIEF OF THE FEDERAL POWER COMMISSION IN OPPOSITION

ROBERT L. MCCARTY
CHARLES F. WHEATLEY, JR.
B. DWIGHT PERRY
McCarty and Wheatley
Walker Building
Washington, D. C. 20005

JEREMY C. COOK
Turlock Irrigation District
Turlock, California

WARRENT F. GANT
Modesto Irrigation District
Modesto, California

Counsel for Petitioners Turlock Irrigation District and Modesto Irrigation District

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The Brief of the Federal Power Commission in Opposition provides no valid ground for denying review of the important issues under the Federal Power and Raker Acts decided by the Ninth Circuit on which the Districts seek certiorari. Nowhere does the Commission argue that the issues raised by the Districts are unimportant to the administration of the Federal Power Act (and conversely to the States in the administration of irrigation and municipal use water rights), or are settled by decisions of this Court, or are established by any administrative practice, so as to

obviate review.[1] Rather, the Commission opposes the District's petition on a novel effort to distinguish *First Iowa* and other existing precedents of this Court and upon an erroneous view of the record as to the impact of the decision below on the proposed project.

1. The Commission, while admitting that this Court's *First Iowa* decision construed Section 27 as saving to the States and precluding Commission jurisdiction over the "control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses" (Br. Op. 8-9), would circumvent that decision on the premise that no applicant can object to a license condition taking such rights because the applicant need not accept the license so tendered. But under this logic *any* condition sought to be imposed by the Commission, regardless of the Act's limitations, could never be challenged because licenses must always be accepted before effective. This view would give the Commission unlimited power to impose any condition without regard to the strictures of the Act. That the Commission aparently so construes its authority is seen from its failure to even consider in its brief the clear intent of Congress in enacting Sections 10(a) and 27 to withhold Commission jurisdiction to alter or control any State consumptive use, or the plain language of Section 29 of the Federal Power Act precluding the Commission from modifying or amending any of the terms of the Raker Act of 1913.[2]

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[1] In contradistinction, the Government does argue that the questions raised by the petition of California in No. 580 "are not of such character as to require re-examination in this Court." (Br. Op. 15.)

[2] The Commission's basic assumption that it has jurisdiction to reallocate irrigation and municipal consumptive uses regardless of § 27 as construed in *First Iowa*, § 10(a), and § 29, is made quite clear when the Commission argues in effect that if a private power company were seeking a license for New Don Pedro the Commission could order it to take the Districts' vested irrigation rights (downstream) to reallocate those waters to fish, regardless of a conflicting State adjudication according priority to the Districts' irrigation uses over fish (see Br. Op. 10, fn. 8).

The Commission's novel theory that "acceptance" obviates inquiry into the legality of a proposed condition is clearly erroneous. In *First Iowa* this Court set forth its view of the effect of Section 27 while addressing itself to the considerations the Commission was to utilize in the licensing process.[3] Furthermore, Section 313(b) of the Act providing for judicial review of the Commission's action on issuing a license would be meaningless if the applicant's ultimate option to accept the license precluded review as to whether the Commission exceeded its statutory authority.

2. The Commission's attempt in its brief to minimize the impact of the Ninth Circuit's holding that "the Commission has the legal authority to take appropriate action restricting the use of such irrigation rights, should the occasion arise" (App. 11a), is erroneous and contrary to the record. This holding on the direct review proceedings under Section 313(b), if not reversed, can never be challenged subsequently. *Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320 (1958). Thus, the Districts are required to subject all of their vested irrigation water rights acquired under State law and recognized by the Raker Act, to the unlimited discretion of the Federal Power Commission for future reallocation to other uses.[4]

The practical consequences to the Districts are grave. The Examiner expressly found that there would be impair-

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[3] In *Federal Power Commission* v. *Niagara Mohawk Power Corp.,* 347 U.S. 239 (1954), this Court confirmed its *First Iowa* construction of Section 27 as protective of a licensee and as applicable on the issuance of a license under Section 10(a), stating: "In *First Iowa* . . . § 27 of the Act was discussed in relation to conditions *controlling the approval of projects.*" (347 U.S. at 256; emphasis supplied.)

[4] The terms of Article 37 regarding future releases after 20 years place no restrictions on impairment of the Districts' irrigation rights. The decision below that economic feasibility of the project will be maintained poses no guarantee of water availability for irrigation.

ment, even below the irrigation supply available to the Districts in critical years from their existing project, under California Fish and Game's releases (JA 493-494). He accordingly imposed no fixed releases. After the Commission adopted those release schedules in its Article 37, with slight modification, the Districts demonstrated in their petition for rehearing that there would still be substantial impairment of their irrigation and Raker Act entitlements during the first 20 years of project operation, based on repetition of the historical hydrology of record (JA 734-739), not on "unprecedented" conditions (Br. Op. 6, 8). Accordingly, if the Commission's "unprecedented low water conditions" (Br. Op. 6) should occur, the impact of releases under Article 37 foreseeably would be more severe than that found by the Examiner.[5]

In the circumstances, the Districts are convinced that the Examiner was correct in adopting the conclusion that:

> "... By 1985 the dependable minimum year irrigation supply under New Don Pedro with the fish conditions would be about 546,000 acre-feet or more than 100,000 acre-feet less than that of existing Don Pedro. Certainly no farmer can be expected to pay more for a new project that will provide less water. He would rightly ask why such a project should be built at all." (JA 495)

The Districts are accordingly faced with a costly project to be built, if at all, at the sacrifice of their existing project, with no assurance that the new project will be permitted to perform its essential purpose of conservation for water-short years. This project should not be vetoed through

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[5] Furthermore, the New Don Pedro project, even with dependable power capacity assured, would operate at an annual *deficit* of $51,000 (J. A. 667) for the entire 50-year license period assuming an anticipated 4.5% cost of money. This contrasts sharply with the present annual net value of power from the Districts' existing Don Pedro project of $956,000.

failure of the Commission to adhere to the statutory limitations imposed by Congress in the Federal Power Act as well as the Raker Act upon which the Districts have relied for years in developing their irrigated economies.

For the above reasons, as well as those set forth in their petition, the Districts pray that the Court grant certiorari.

Respectfully submitted,

ROBERT L. MCCARTY
CHARLES F. WHEATLEY, JR.
B. DWIGHT PERRY
McCarty and Wheatley
Walker Building
Washington, D. C. 20005

JEREMY C. COOK
Turlock Irrigation District
Turlock, California

WARRENT F. GANT
Modesto Irrigation District
Modesto, California

Counsel for Petitioners Turlock Irrigation District and Modesto Irrigation District

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